ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 2009-2106

APPEAL FROM THE COURT OF APPEALS
FIRST APPELATE DISTRICT
HAMILTON COUNTY, OHIO
CASE NO. C 09 00708

LEOLA SUMMERVILLE,
Plaintiff-Appellee,

vs.

CITY OF FOREST PARK, et al.,
Defendants-Appellants.

BRIEF OF AMICUS CURIAE, OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS URGING REVERSAL ON BEHALF OF DEFENDANTS-APPELLANTS

Lynnette Dinkler (0065455)
Lynnette@dinklerpregon.com
Jamey T. Pregon (0075262)
Jamey@dinklerpregon.com
DINKLER PREGON, LLC
2625 Commons Boulevard, Suite A
Dayton, OH 45431
(937) 426-4200
(866) 831-0904 (fax)
Attorneys for Amicus Curiae,
Ohio Association of Civil Trial Attorneys

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Lawrence E. Barbiere (0027106)
SCHROEDER, MAUNDRELL, BARBIERE & POWERS
5300 Socialville Foster Road, Suite 200
Mason, OH 45040
(513) 583-4210
(513) 583-4203 (fax)
Counsel for Appellants, City of Forest Park, Adam Pape, and Corey Hall

Marc D. Mezibov (0019316)
Susan M. Lawrence (0082811)
THE LAW OFFICE OF MARC MEZIBOV
401 E. Court Street, Suite 600
Cincinnati, OH 45202
(513) 621-8800
(513) 621-8833 (fax)
Counsel for Appellee, Leola Summerville, Administrator of the Estate of Roosevelt Summerville, Deceased, and Leola Summerville

Stephen L. Byron (0055657)
Rebecca K. Schaltenbrand (0064817)
SCHOTTENSTEIN, ZOX & DUNN CO., LPA
Interstate Square Building I
4230 State Route 306, Suite 240
Willoughby, OH 44094
(216) 621-5107
(216) 621-5341 (fax)
Counsel for Amicus Curiae, The Ohio Municipal League

John Gotherman (0000504)
Ohio Municipal League
175 S. Third Street, Suite 510
Columbus, OH 43215-7100
(614) 221-4349
(614) 221-4390 (fax)
Counsel for Amicus Curiae, The Ohio Municipal League

Stephen J. Smith (0001344)
SCHOTTENSTEIN, ZOX & DUNN CO., LPA
250 West Street
Columbus, OH 43215
(614) 462-2700
(614) 462-5135 (fax)
Counsel for Amicus Curiae, The Ohio Municipal League

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STATEMENT OF FACTS

This case arises from events occurring on or about September 15, 2005, when Leola Summerville called police after arriving home and finding her husband, Roosevelt Summerville, barricaded in a bedroom and unresponsive. (L. Summerville Dep., p. 1). After receiving the call from Ms. Summerville, Defendants, Officers Adam Pape and Corey Hall of the Forest Park, Ohio Police Department, arrived at the Summerville home. (Id., p. 62).

When Officer Pape reached the bedroom where Mr. Summerville was located, Mr. Summerville began stabbing himself in the chest repeatedly with an instrument. (Id., p. 67-68; Pape Depo., p. 91). After Officer Pape used his taser, to no avail, in an effort to stop Mr. Summerville from stabbing himself, Mr. Summerville approached Officers Pape and Hall wielding the instrument he was using to stab himself and lunged toward the officers. (Pape Depo., p. 94, *et seq.*) The officers then simultaneously shot and killed Mr. Summerville. (Id., p. 98-122).

On September 6, 2007, Plaintiff-Appellee, Leola Summerville ("Plaintiff"), administrator of the Estate of her husband, Roosevelt Summerville, initiated this action asserting claims under 42 U.S.C. § 1983 and pursuant to Ohio law. (Complaint). On September 28, 2009, the trial court granted summary judgment in favor of Defendant-Appellants based upon Chapter 2744 immunity with respect to Plaintiff's state law claims, but denied summary judgment to Officers Adam Pape and Corey Hall with respect to Plaintiff's excessive force claim brought pursuant to 42 U.S.C. § 1983. (See Entry, Sept. 29, 2009). In denying summary judgment on the excessive force claim, the trial court denied the officers qualified immunity. (Id.) The trial court also denied summary judgment to the City of Forest Park on Plaintiff's claim for deliberate indifference in allegedly failing to adequately train which was also made pursuant to 42 U.S.C. §

1983. (Id.)

Defendants-Appellants appealed the trial court's decision to the First District Court of Appeals to the extent that summary judgment had been denied, pursuant to R.C. 2744.02(C), which provides that orders denying "a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order." (See, Notice of Appeal, Oct. 6, 2009). Plaintiff-Appellee moved to dismiss the appeal, arguing that R.C. Chapter 2744 was inapplicable to claims asserted under 42 U.S.C. § 1983 and, therefore, the trial court's order was not a final, appealable order. (Plaintiff's Mot. To Dismiss, Oct. 10, 2009). The Court of Appeals for the First Appellate District dismissed the appeal without opinion on October 28, 2009. *Summerville v. City of Forest* Park (Oct. 28, 2009), Hamilton App. No. C-09-00708.

On November 19, 2009, Defendants-Appellants filed a notice appeal with this Court. On February 10, 2010, this Court accepted discretionary review of this matter. (02/10/2010 Case Announcements, 2010-Ohio-354). Amicus Curiae, the Ohio Association of Civil Trial Attorneys ("OACTA") urges reversal of the appellate court's dismissal of Defendants-Appellants' appeal.

ARGUMENT

I. OHIO'S POLITICAL SUBDIVISIONS AND EMPLOYEES POSSESS A STATUTORY RIGHT TO AN IMMEDIATE APPEAL FROM AN ORDER DENYING THE BENEFIT OF QUALIFIED IMMUNITY PURSUANT TO THE PLAIN LANGUAGE OF REVISED CODE SECTION 2744.02(C).

This appeal requires construing the statutory language of Ohio Revised Code Chapter 2744. When construing statutes, courts "must first look to the plain language of the statute itself to determine the legislative intent." *Xenia v. Hubbell*, 115 Ohio St.3d 77, 2007-Ohio-4839, ¶ 11, citing *State ex rel. Burrows v. Indus. Comm.* (1997), 78 Ohio St.3d 78. In doing so, courts "apply a statute as it is written when its meaning is unambiguous and definite." Id., citing *Portage Cty.*

Bd. of Commrs. v. Akron, 109 Ohio St.3d 106, 2006-Ohio-954, ¶ 52; *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.* (1996), 74 Ohio St.3d 543. Absent ambiguity, a "statute must be applied in a manner consistent with the plain meaning of the statutory language." Id, citing *Burrows*, 78 Ohio St.3d at 81.

Specifically, this appeal requires construing the language of R.C. 2744.02(C) and R.C. 2744.09(E) to determine whether an order denying a political subdivision, or its employees, the benefit of a qualified immunity defense constitutes a final, appealable order. Generally, "an order must be final before it can be reviewed by an appellate court." *Xenia v. Hubbell*, 115 Ohio St.3d 77, 2007-Ohio-4839, ¶ 9; see, also, Civ.R. 54(B); R.C. 2505.02(B). Pursuant to these general rules involving final orders, typically, "the denial of summary judgment is not a final, appealable order." Id., citing *State ex rel. Overmeyer v. Walinski* (1966), 8 Ohio St.2d 23.

However, R.C. 2744.02(C) specifically provides that, "An order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order." This Court recognizes that, pursuant to R.C. 2744.02(C), one seeking an appeal from an order denying "a motion in which a political subdivision or its employee seeks immunity under R.C. Chapter 2744" is an "order denying "the benefit of an alleged immunity and is therefore a final, appealable order pursuant to R.C. 2744.02(C)." Id., at syllabus; see, also, *Sullivan v. Anderson Twp.*, 122 Ohio St.3d 83, 2009-Ohio-1971 (holding that "R.C. 2744.02(C) permits a political subdivision to appeal a trial court order that denies it the benefit of an alleged immunity from liability under R.C. Chapter 2744, even when the order makes no determination pursuant to Civ.R. 54(B)").

While this instant appeal does not concern the denial of an immunity defense under R.C. Chapter 2744, R.C. 2744.02(C), by its very terms, applies to immunities beyond those provided for in R.C. Chapter 2744. The clear language of R.C. 2744.02(C) extends to the denial of the benefit of an immunity provided by "any other provision of the law[.]" R.C. 2744.01(D) defines "law" as "any provision of the constitution, statutes, or rules of the United States or of this state[.]"[1] In fact, Ohio courts interpreting the term "law" in R.C. 2744.02(C), in conjunction with its definition in R.C. 2744.01(D), have concluded that it encompasses "all federal and state rules, both judicial and legislated." *Marcum v. Rice* (Nov. 3, 1998), Franklin App. Nos. 98AP-717, 98AP-718, 98AP-179, 98AP-721, 1998 Ohio App. LEXIS 5385.

Thus, contrary to Plaintiff's suggestion in the memorandum in opposition to jurisdiction, the phrase "any other provision of the law[,]" as used in R.C. 2744.02(C), specifically includes immunities provided for by federal law, and is not limited solely to those immunities provided by sections of the Ohio Revised Code. Accordingly, R.C. 2744.02(C) extends to the denial of qualified immunity, and as a result, an order denying a public official the benefit of qualified immunity under federal law is a final order pursuant to R.C. 2744.02(C).

Plaintiff contends that R.C. 2744.02(C) does not apply to the trial court's denial of the benefit of a qualified immunity defense because this appeal involves Plaintiff's federal § 1983 claims, and R.C. 2744.09(E) generally provides that R.C. Chapter 2744 "does not apply to, and shall not be construed to apply to * * * [c]ivil claims based upon alleged violations of the constitution or statutes of the United States[.]" Plaintiff contends that such general exception

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[1] R.C. 2744.01(D) further provides that when the term "law" is "used in connection with the 'common law,' this definition does not apply." Thus, the broader definition of the term law, as used in R.C. Chapter 2744, includes the common law. However, the word "law" as used in the phrase "common law" does not broaden the common meaning of the phrase "common law" by virtue of the definition in R.C. 2744.01(D). See Marcum (holding that "when the term 'common law' is used in Chapter 2744, the General Assembly intended to encompass only judicially created rules. However, when the term 'law,' standing alone, is used in R.C. Chapter 2744, the General Assembly intended to encompass all federal and state rules, both judicial and legislated").

applies to render the specific procedural mandate of R.C. 2744.02(C) inapplicable to any denial of the benefit of qualified immunity on claims arising under federal law, such as Plaintiff's §1983 claims.

However, all cases cited by Plaintiff in support of such contention simply hold that R.C. 2744.09(E) renders the *immunity* provided for under R.C. Chapter 2744 inapplicable to claims arising under federal law. See *W.P. v. City of Dayton*, 2nd Dist No. 22549, 2009-Ohio-52, ¶ 12 (stating only that *the immunity* under R.C. Chapter 2744 does not apply to § 1983 claims); *Campbell v. City of Youngstown*, 7th Dist. No. 006MA184, 2007-Ohio-7219 (considering only whether R.C. Chapter 2744 provides *immunity* for federal claims); *Patton v. Wood County Humane Soc.* 92003), 154 Ohio App.3d 670, 2003-Ohio-5200, ¶ 33 (holding, simply, that "*the immunities* found within R.C. Chapter 2744 do not apply to Section 1983 actions") (emphasis added). None of these cases hold that the "final order" language of R.C. 2744.02(C), which by its very terms is made specifically applicable to claims of immunity arising under federal law, is rendered inapplicable to federal claims. Thus, there is no conflict between R.C. 2744.02(C) and R.C. 2744.09(E). R.C. 2744.09(E) simply applies to bar the application of R.C. Chapter 2744 *immunity* to claims arising under federal law, such as § 1983 claims.

And, should a conflict between R.C. 2744.02(C) and R.C. 2744.09(E) be perceived to exist, the final order language in R.C. 2744.02(C), as a specific procedural provision, must prevail over the general provision set forth in R.C. 2744.09(E). In fact, R.C. 1.51 specifically provides that:

> If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

In other words, "a specific statute, enacted later in time than a pre-existing general statute, will control where a conflict between the two arises." *Bp Exploration & Oil, Inc. v. Ohio Dept. of Commerce*, 9th Dist. App. 04AP619, 04AP620, 2005-Ohio-1533, ¶ 23, citing *Davis v. State Personnel Bd. of Review* (1980), 64 Ohio St.2d 102 (holding that "a specific statute, enacted later in time than a preexisting general statute, will control where a conflict between the two arises").

Here, R.C. 2744.02(C) is a special, specific procedural provision, while R.C. 2744.09(E) is a general exception to the applicability of R.C. Chapter 2744 immunity. Further, R.C. 2744.02(C) was enacted later in time than R.C. 2744.09(E). Accordingly, insofar as an irreconcilable difference exists between the two sections, R.C. 2744.02(C) must prevail and act "as an exception to the general provision" set forth in R.C. 2744.09(E). R.C. 1.51. Thus, an order denying a political subdivision or its employees the benefit of qualified immunity is a final order that is immediately appealable pursuant to R.C. 2744.02(C).[2]

As a result, the order of the First District Court of Appeals dismissing the appeal for lack of a final appealable order must be reversed, and this case must be remanded to the Court of Appeals for its consideration of the merits of the appeal.

II. ABSENT IMMEDIATE APPEAL OF ORDERS DENYING QUALIFIED IMMUNITY, THE BENEFITS OF SUCH IMMUNITY WOULD BE EFFECTIVELY LOST AND JUDICIAL ECONOMY WOULD NOT BE SERVED.

This Court previously noted that, "[j]udicial economy is actually better served by a plain reading of R.C. 2744.02(C)." *Hubbell*, 2007-Ohio-4839, ¶ 24. As noted above, a plain reading of R.C. 2744.02(C) provides that orders denying the benefit of qualified immunity are final

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[2] The Fourth District Court of Appeals in *Lutz v. Hocking Technical College* (May 18, 1999), Athens App. No. 98CA12, 1999 Ohio App. LEXIS 2360, recognized that the denials of qualified immunity seemingly fall within the plain terms of R.C. 2744.02(C), and that R.C. 2744.02(C) was enacted later in time than R.C. 2744.09(E). However, the Fourth District Court of Appeals in *Lutz* failed to recognize the applicability of R.C. 1.51 and, thus, erroneously concluded that R.C. 2744.09(E) prevailed over the terms of R.C. 2744.02(C) with regard to appeals of the denial of qualified immunity in § 1983 claims.

orders. In illustrating the furtherance of judicial economy advanced by R.C. 2744.02(C), this Court recognized that immunity determinations are "usually pivotal to the ultimate outcome of a lawsuit." Id., citing *Burger v. Cleveland Hts.* (1999), 87 Ohio St.3d 188, 199-200, 1999-Ohio-319 (Lundberg Stratton, J., dissenting). As a result, all parties to litigation benefit from finally resolving issues of immunity early, at a point before incurring the often high expense of litigating a matter through trial. Id. at ¶¶ 25-26.

Specifically, this Court found that:

> If the appellate court holds that the political subdivision is immune, the litigation can come to an early end, with the same outcome that otherwise would have been reached only after trial, resulting in a savings to all parties of costs and attorney fees. Alternatively, if the appellate court holds that immunity does not apply, that early finding will encourage the political subdivision to settle promptly with the victim rather than pursue a lengthy trial and appeals. Under either scenario, both the plaintiff and the political subdivision may save the time, effort, and expense of a trial and appeal, which could take years.

Id. at ¶ 25 Thus, in interpreting the plain language of R.C. Chapter 2744, it is clear that the legislature sought an early determination of issues "of immunity * * * prior to investing the time, effort, and expense of the courts, attorneys, parties, and witnesses[.]" Id. at ¶ 26, citing *Burger*, 87 Ohio St.3d 188, 199-200 (Lundberg Stratton, J., dissenting). In fact, "[t]he primary purpose of governmental immunity is to conserve the fiscal integrity of political subdivisions." *Wilson v. Stark Cty. Dept. of Human Services* (1994), 70 Ohio St.3d 450, 543.

Federal courts apply a similar rationale in finding that orders denying a public official the benefit of qualified immunity are final and appealable. See *Mitchell v. Forsyth* (1985), 472 U.S. 511, 525-530; *Brannum v. Overton County School Bd.* (6th Cir. 2008), 516 F.3d 489, 493. The court in *Mitchell* determined that qualified immunity "is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." Id. at 526. In other words, qualified immunity provides

immunity not only from liability, but from the "consequences" of suit, such as:

> the general costs of subjecting officials to the ***risks of trial*** -- distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.

Id. at 526 (emphasis added); see, also, *Doe v. Exxon Mobile Corp.*, 473 F.3d 345, 350 (D.C. Cir. 2006).

As a result, pretrial denials of qualified immunity cannot be effectively reviewed after trial because "the court's denial * * * finally and conclusively determines the defendant's claim of right not to stand trial on the plaintiff's allegations, and because '[t]here are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred[.]'" Id., (internal citations omitted); see, also, *Brannum*, 516 F.3d at 493 (holding that should "a public official [be] unable to appeal the denial of qualified immunity immediately, he would be forced to endure the cost, expense, and inconvenience of defending an action to which he may be immune").

In other words, "[t]o require [a public official] to delay his appeal challenging the trial court's rejection of his qualified immunity defense until the underlying liability issue is determined, would defeat one of the very purposes for which the doctrine exists." *Brannum*, 516 F.3d at 493; see, also, *Hill v. McKinley*, 311 F.3d 899, 902 (8th Cir. 2002) (stating that because "'qualified immunity is an 'entitlement not to stand trial,' [citations omitted] * * * the defense of qualified immunity 'is effectively lost if a case is erroneously permitted to go to trial'"); *Mitchell*, 472 U.S. at 526. Accordingly, the right to an immediate appeal ensures that all public officials obtain the benefit for which qualified immunity exists in the first place.

Further, because the significant policy reasons behind allowing an immediate appeal of immunity denials includes preventing the needless accumulation of expenses associated with

trying a case to conclusion and protecting public officials from the ***risks*** associated with trial, it is important to consider the additional ***risk*** public officials face for incurring liability for the opposing party's attorney fees in federal civil rights actions. In a § 1983 action, "the court, in its discretion, may allow the prevailing party * * * a reasonable attorney's fee as part of the costs[.]" 42 U.S.C. § 1988; see, also, *Cleary v. City of Cincinnati*, Hamilton App. No. C-060410, 2007-Ohio-2797, ¶ 16 (stating that "[p]revailing plaintiffs in Section 1983 actions are entitled to reasonable attorney fees"). Thus, a public official confronted with fully litigating a matter through trial before being able to seek appellate review of qualified immunity issues is not only forced to unnecessarily accumulate litigation expenses on his/her own behalf, but is also subject to an order requiring the payment of the opposing party's attorney fees. Id.

While the public official may ultimately prevail on the issue of immunity at trial, the *risk* of not prevailing and being subject to potentially paying the opposing party's fees may be so substantial that the official is forced to settle a matter for which he/she is otherwise immune. In those cases, qualified immunity provides little benefit absent an immediate right to appeal. See *Brannum*. Conversely, if an immediate appeal reveals the official's qualified immunity defense will have to be decided by a jury, then the official is given the benefit of weighing and balancing the benefits of a pretrial settlement before additional attorneys fees are incurred which the official may ultimately have to pay under 42 U.S.C. § 1988. Thus, the absence of a right to immediately appeal an order denying qualified immunity may result in the unnecessary expenditure of public funds to settle cases despite a viable immunity defense.

III. ALTERNATIVELY, IF AN ORDER DENYING THE BENEFIT OF QUALIFIED IMMUNITY IS NOT A FINAL APPEALABLE ORDER PURSUANT TO R.C. 2744.02(C), THIS COURT SHOULD ADOPT THE COLLATERAL ORDER DOCTRINE AS APPLICABLE TO SUCH ORDERS AS SET FORTH IN *MITCHELL*.

Should the Court determine that an order denying the benefit of qualified immunity in regard to an action asserted pursuant to federal law is not a final order under R.C. 2744.02(C), the Court should adopt and apply the "collateral order doctrine" as set forth in *Mitchell*, 472 U.S. 511. In *Mitchell*, the United State Supreme Court found that an order denying a claim of qualified immunity constituted an "final decision" under 28 U.S.C. § 1291, which provides:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States[.]

Mitchell, at 525-530. In so determining, the court applied the "collateral order doctrine," along with the rationale set forth in the preceding section of this brief, and held that orders denying the benefit of qualified immunity are among those orders "which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Mitchell*, 472 U.S. at 524-525, citing *Cohen v. Beneficial Industrial Loan Corp.* (1949), 337 U.S. 541, 546.

While state courts are not required to adopt and apply the "collateral order doctrine" as illustrated in *Mitchell*, states are free to adopt and apply it in "construing their jurisdictional statutes[.]" *Johnson v. Fankell* (1997), 520 U.S. 911, 916-917. For the reasons set forth in the preceding discussion of the policy and rationale supporting the right to immediately appeal orders denying the benefit of qualified immunity, this Court should adopt the "collateral order

doctrine" as it applies to the denial of qualified immunity should the Court determine that R.C. 2744.02(C) does not apply.[3]

As noted by the United States Supreme Court in *Johnson*, "some States have adopted a similar 'collateral order' exception when construing their jurisdictional statutes[.]" *Johnson*, 520 U.S. at 917, citing *Richardson v. Chevrefils*, 131 N. H. 227, 231, 552 A.2d 89, 92 (1988) ("Although all of the court's rulings . . . would normally be treated as interlocutory, . . . [w]e have followed *Mitchell* in accepting the State defendants' appeal from the order denying their motion for summary judgment"); *Murray v. White*, 155 Vt. 621, 626, 587 A.2d 975, 977-978 (1991) ("In [*Mitchell*], the Supreme Court held that a trial court's denial of a claim of qualified immunity met these [collateral order] requirements, and we agree with this determination"); *Park County v. Cooney*, 845 P.2d 346, 349 (Wyo. 1992) ("We believe the state decisions which allow appeal, for the reasons detailed in *Mitchell* . . . , are better reasoned; and we therefore hold that an order denying dismissal of a claim based on qualified immunity is an order appealable to this court").

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3 Ohio's general statute governing final orders is R.C. 2505.02(B)(1), which provides that "[a]n order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is * * * [a]n order that affects a substantial right in an action that in effect determines the action and prevents a judgment." A "substantial right" typically means "a 'legal right,' one protected and supported by law." *Hamilton County Bd. of Mental Retardation and Developmental Disabilities v. Professionals Guild of Ohio* (1989), 46 Ohio St.3d 147, 153; see, also, R.C. 2505.02(A)(1). An order that "determines the action and prevents a judgment" is an order that disposes "of the whole merits of the cause or some separate and distinct branch thereof and leave[s] nothing for the determination of the court." *State ex rel. Downs v. Panioto*, 107 Ohio St.3d 347, 2006-Ohio-8, ¶ 20 (emphasis added).

Here, there should be no dispute that the trial court's order affected a substantial right, i.e., the right to qualified immunity. *Johnson*, 520 U.S. at 914 (stating that state officials possess a legal right to assert a qualified immunity defense when "sued under 42 U.S.C. § 1983"); *Mitchell*, supra (holding that orders denying the benefits of qualified immunity fall within the category of orders that "finally determine claims of right separable from, and collateral to, rights asserted in the action"). Further, while the trial court's denial of Defendants' qualified immunity defense leaves the claims subject to qualified immunity pending, the order did effectively dispose of a separate and distinct branch of the action. Qualified immunity "is conceptually distinct from the merits of plaintiff's claim that his rights have been violated." *Mitchell* at 527-528. As a result, orders denying the benefits of qualified immunity fall within the category of orders that "finally determine claims of right separable from, and collateral to, rights asserted in the action[.]" Id. at 527-528. Thus, the order denying the benefit of qualified immunity affects a substantial right and decides a separate and distinct branch of the whole action, and therefore, is a final order pursuant to R.C. 2505.02(B)(1).

More recently, other states have also adopted versions of the "collateral order" doctrine as it relates to orders denying the benefit of qualified immunity. See *Robinson v. Pack* (2009), 223 W.Va. 828, 679 S.E.2d 660, at paragraph two of syllabus (stating that "[a] circuit court's denial of summary judgment that is predicated on qualified immunity is an interlocutory ruling which is subject to immediate appeal under the 'collateral order' doctrine"); *Williams v. Baird* (2007), 273 Neb. 977, 735 N.W.2d 383, 391 (holding that "[w]e * * * agree with the U.S. Supreme Court that the denial of a claim of qualified immunity, where the issues presented are purely questions of law, should be immediately reviewable under the collateral order doctrine"); *Kastner v. Star Trials Asso.* (Minn. 2002), 646 N.W.2d 235, at syllabus (holding that "[t]he collateral order doctrine provides the proper analysis for determining whether a party is entitled to an interlocutory appeal of denial of an immunity-based summary judgment motion").

This court has already recognized that "[j]udicial economy is actually better served by" an immediate appeal of orders denying the immunity provided for in R.C. Chapter 2744. *Hubbell* at ¶ 24. Such policy is equally applicable to the denial of qualified immunity. As set forth more fully in the preceding section, an immediate appeal of an order denying the benefit of qualified immunity is necessary: to preserve "the very purposes for which the doctrine exists[,]" i.e., the entitlement not to stand trial; to prevent the exposure of a public official and political subdivisions to the risks of trial, such as an order requiring the payment of plaintiff's attorney's fees pursuant to 42 U.S.C. § 1988; to prevent the unnecessary expenditure public resources litigating to trial matters where immunity should bar suit; and to prevent the unnecessary expenditure of public funds to settle cases despite a viable immunity defense. See *Brannum*, 516 F.3d at 493.

Accordingly, should the Court determine that an order denying the benefit of qualified immunity is not a final order under R.C. 2744.02(C), the Court should adopt and apply the collateral order doctrine as set forth in *Mitchell*, 472 U.S. 511.

IV. ADDITIONALLY, WHERE FINAL APPEALABLE ORDERS DENYING THE BENEFIT OF IMMUNITY EXIST, AND RELATED *MONNELL* CLAIMS ARE IN NEED OF APPEALLATE REVIEW, THIS COURT SHOULD ADOPT THE PENDANT JURISDICTION DOCTRINE AS APPLICABLE TO SUCH ORDERS AS SET FORTH IN *MATTOX*.

The City of Forest Park requested that the Appellate Court exercise pendent appellate jurisdiction over the claims against it based upon the authority of *Mattox v. City of Forest Park*, 1881 F.3d 515 (6th Cir. 1999). Those *Monnell* claims do not have an immunity defense available to them as a matter of law, however, the issues are so intertwined with the immunity claims that they should, for all the judicial economy principles set forth above, and already recognized by this Court, be reviewed on appeal at the same time. To hold otherwise, unnecessarily wastes the already scarce Ohio resident tax dollars.

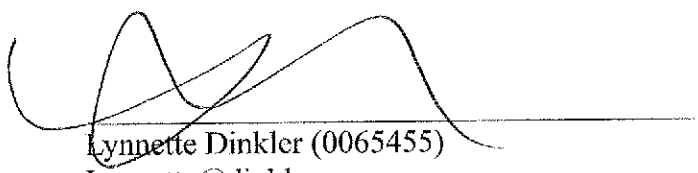
To date, the Seventh and Eighth appellate districts have reached issues beyond immunity itself in similar appeals. *State ex rel. Conroy v. Williams*, 2009-Ohio-6040, Mahoning App. 08MA60 (7th Dist. 2009)(" While we are here to address only the denial of the immunity claims, because by statute these are the only claims immediately appealable, the issues in this case are so intertwined that some discussion on all claims will be necessary"); *Cincinnati Ins. Co. v. City of Cleveland*, 2009-Ohio-4043, Cuyahoga App. No. 92305 (8th Dist. 2009)(majority considered a contract claim against political subdivision on appeal pursuant to O.R.C. § 2744.02(C)). This Court, in this case, should mandate that such issues, including 42 U.S.C. § 1983 claims brought against Ohio's political subdivisions, be heard where immediate appeals are otherwise afforded to political subdivisions and their employees under R.C. 2744.02(C).

CONCLUSION

For the foregoing reasons, an order denying a political subdivision or its employees the benefit of qualified immunity is a final order that is immediately appealable pursuant to R.C. 2744.02(C). Further, such a conclusion best serves the interests of judicial economy and is consistent with the policy reasons supporting an immediate appeal of orders denying the benefit of an alleged immunity. Absent a right to immediately appeal orders denying the benefit of qualified immunity defeats the purpose of the immunity in the first place.

Accordingly, OACTA urges the Court to reverse the order of the First District Court of Appeals, and to remand this matter to the appellate court for consideration of Defendants-Appellants appeal on its merits.

Respectfully submitted,



Lynnette Dinkler (0065455)
Lynnette@dinklerpregon.com
Jamey Pregon (0075262)
Jamey@dinklerpregon.com
DINKLER PREGON, LLC
2625 Commons Boulevard, Suite A
Dayton, OH 45431
(937) 426-4200
(866) 831-0904 (fax)
Attorneys for Amicus Curiae,
Ohio Association of Civil Trial Attorneys

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished to the following by U. S. Mail this 30th day of April, 2010:

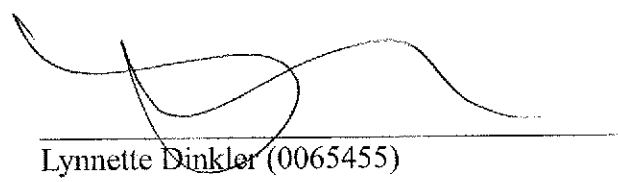
Lawrence E. Barbiere, Esq.
Schroeder, Maundrell, Barbiere & Powers
5300 Socialville Foster Road, Suite 200
Mason, OH 45040
Counsel for Appellants, City of Forest Park, Adam Pape, and Corey Hall

Marc D. Mezibov, Esq.
Susan M. Lawrence, Esq.
The Law Office of Marc Mezibov
401 E. Court Street, Suite 600
Cincinnati, OH 45202
Counsel for Appellee, Leola Summerville, Administrator of the Estate of Roosevelt Summerville, Deceased, and Leola Summerville

Stephen L. Byron, Esq.
Rebecca K. Schaltenbrand, Esq.
Schottenstein, Zox & Dunn Co., LPA
Interstate Square Building I
4230 State Route 306, Suite 240
Willoughby, OH 44094
Counsel for Amicus Curiae, The Ohio Municipal League

John Gotherman, Esq.
Ohio Municipal League
175 S. Third Street, Suite 510
Columbus, OH 43215-7100
Counsel for Amicus Curiae, The Ohio Municipal League

Stephen J. Smith, Esq.
Schottenstein, Zox & Dunn Co., LPA
250 West Street
Columbus, OH 43215
Counsel for Amicus Curiae, The Ohio Municipal League



Lynnette Dinkler (0065455)

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